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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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NATIONAL UNION FIRE INSURANCE COMPANY,
Petitioner,

vs.

E. EGGERS, INDIVIDUALLY AND AS CLAIMANT OF THE TUG FANNY D. AND BARGE TEXAS NO. 2.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEO. H. TERRIBERRY,
JOS. M. RAULT,
WALTER CARROLL,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of National Union Fire Insurance Company, a corporation organized and existing under the laws of the State of Pennsylvania, with respect shows:

A.

Summary Statement of Matter Involved.

This is an application for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Fifth Circuit reversing a judgment of the United States District

Court for the Southern District of Texas, Houston Division, in favor of National Union Fire Insurance Company, defendant, in a suit for a declaratory judgment on a policy of marine insurance.

The facts are undisputed. On October 27, 1937, the *SS. City of Houston,* owned by the Southern Steamship Company, was moored at a dock in the harbor of Houston, Texas. That night the tug *Fanny D.,* made fast to the starboard quarter of the oil barge *Texas No. 2,* was towing that barge fully loaded through the Houston harbor. The barge was without propelling or steering power and carried no crew. In attempting to pass the berth occupied by the *SS. City of Houston,* the tug *Fanny D.* permitted her attached barge to collide with the *SS. City of Houston,* doing damage to that vessel (R. 58-64).

Both the tug *Fanny D.* and the barge *Texas No. 2* were owned by E. Eggers, respondent herein. The tug *Fanny D.* was uninsured. The barge *Texas No. 2* was covered by hull and P. & I. insurance under marine policies written by the National Union Fire Insurance Company, petitioner herein.

The Southern Steamship Company, owner of the *SS. City of Houston,* filed its collision libel in the United States District Court for the Southern District of Texas *in rem* against the tug *Fanny D., in rem* against the barge *Texas No. 2,* and *in personam* against E. Eggers, the common owner of the tug and tow (R. 25). The National Union Fire Insurance Company, being interested in the case solely on account of its hull policy on the barge *Texas No. 2,* employed separate counsel to act for Eggers in his capacity as owner of this barge. Eggers in his capacity as owner of the uninsured tug *Fanny D.* employed his own counsel. Separate claims were filed for the tug and barge, separate release bonds were put up in court, and separate answers through separate counsel were filed in the name of Eggers in his respective capacities as owner of the two vessels (R. 31-44).

While the collision litigation was pending, Eggers filed, in the same court, a complaint for a declaratory judgment against the National Union Fire Insurance Company, underwriter of the barge *Texas No. 2* (R. 4-11), in which he sought to have the court declare that company, as insurer of the barge, liable under its marine policies for the collision damages to the *SS. City of Houston* which resulted while the uninsured tug *Fanny D.* was navigating and controlling the insured barge *Texas No. 2.* The company filed answer denying liability under its policies (R. 11-23).

The cases were tried together. The District Judge in his findings of fact (R. 48-52) found that the *Texas No. 2* had no power and no crew; that she was lashed to the tug *Fanny D.* and was being wholly propelled and controlled by the tug *Fanny D.;* that the tug *Fanny D.* and Eggers as her owner were negligent in navigating the tow close to the south side of the channel; that the tug *Fanny D.* did not keep a proper lookout; that she did not take proper steps to avert the collision; that the barge *Texas No. 2* did not sheer or cause the collision; and that (R. 51):

> "She was not in any way negligent, the sole negligence being that of the (tug) Fanny D. and persons in charge of her".

The court's conclusions of law are brief and are as follows (R. 51-52):

> "(1) Both the 'Fanny D.' and her owner and operator E. Eggers are liable to Libelant in the amount of damages sustained to the 'City of Houston.'
>
> (2) The 'Texas No. 2' having no power of her own and being propelled solely by the 'Fanny D.' is not liable to Libelant. Sturgis *v.* Boyer, 23 Howard 114, and cases there cited and many which follow. The C. W. Mills, 241 Fed. 205. Same case (C. C. A. 5th), 241 Fed. 378. (See Sacramento Nav. Co. *v.* Salz, 273 U. S. 326, for distinction between cases founded on

pure tort and those founded on contract). And this is the rule notwithstanding the fact that the 'Texas No. 2' and the 'Fanny D.' are both owned by Eggers. Liverpool Nav. Co. *v.* Brooklyn Terminal, 251 U. S. 52.

(3) An examination of the policies of the insurance discloses that they do not cover the liability of the 'Fanny D.' to libelant, nor of Eggers as owner of the 'Fanny D.' to libelant.'

Accordingly by interlocutory decree in the collision case the libel *in rem* against the barge *Texas No. 2* and Eggers as her claimant was dismissed (R. 47), and judgment was entered against Eggers as claimant of the tug *Fanny D.* and as respondent in the *in personam* action (R. 46).

In the suit for a declaratory judgment the court entered a final judgment declaring that there was no liability on the National Union Fire Insurance Company under any of the policies involved (R. 24).

Eggers appealed from the final decree in the declaratory judgment suit, and from that portion of the interlocutory decree in the collision case wherein the District Court absolved the barge *Texas No. 2* and Eggers as her claimant and owner from liability (R. 87).

The Circuit Court of Appeals dismissed the appeal from the interlocutory decree in the collision suit, on the ground that it was improperly taken and that accordingly the court was without jurisdiction to entertain the appeal (R. 94, 96). Thus the District Court's decree in the collision case exonerating barge *Texas No. 2* and Eggers as her owner was affirmed.

In the appeal from the final judgment in the proceeding for a declaratory judgment, the Circuit Court of Appeals reversed the District Court and held that there was liability on the National Union Fire Insurance Company under the full collision clause of its hull policy on the barge *Texas No. 2,* on account of the collision liability found to

exist on Eggers as claimant and owner of the uninsured tug *Fanny D.* (R. 94-96). An application for rehearing was denied (R. 98, 114).

The National Union Fire Insurance Company, petitioner herein, seeks this writ of certiorari to correct what it firmly believes to be this erroneous decision on the part of the United States Circuit Court of Appeals.

The Policy Involved.

The hull policy on barge *Texas No. 2* (American Institute Time (Hulls) April 1, 1936, policy No. I. M. H. 450,678) was, by agreement of counsel and order of the District Court, sent up to the United States Circuit Court of Appeals in the original (R. 54). Accordingly it is not set out in the printed transcript. As the court will require this policy in order to pass upon this application for a writ of certiorari, petitioner has attached as an appendix to eleven copies of this petition, photostatic copies of the original barge policy on file with the clerk of the United States Circuit Court of Appeals.

For the convenience of the Court we will summarize briefly the essential terms and coverage of this hull policy on barge *Texas No. 2:*

> *Policy Insures:* "E. Eggers."
> *For Account of:* "Himself."
> *Loss Payable to* "E. Eggers and Gulfport Boiler and Welding Works, Inc., as their respective interests may appear."
> *In the sum of* "$17,500.00."
> *From* July 1, 1937, noon, to July 1, 1938, noon.
> *On the* "New Steel Oil Barge *Texas No. 2.*"
> *Agreed Valuation:* "The said vessel * * * is and shall be valued as follows: $17,500.00."
> *Premium:* "$386.40, being at the rate of 2.208%."
> *Risks covered:* "Perils of the seas"—(damage to barge by wind, waves, lightning, rocks or shoals, strik-

ing submerged objects, groundings, collision damage to barge, etc.).

Fire.

Pirates.

Barratry of Master and Mariners.

And like perils to "the said vessel".

Also, damage to hull and machinery caused by:

"Accidents in loading, discharging, or handling cargo."

Riots.

Explosions on shipboard or elsewhere.

Bursting of boilers.

Negligence of master, charterers, mariners, engineers, or pilots.

Sister-ship salvage: "In the event of salvage, towage, or other assistance being rendered to the vessel hereby insured by any vessel belonging in part or in whole to the same owners or charterers, the value of such services (without regard to the common ownership of the vessels) shall be ascertained by arbitration, in the manner below provided for in the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this policy."

General Average: General average due by vessel to be a charge under the policy.

Full Collision: "If the vessel hereby insured shall come into collision with any other ship or vessel, and the assured or the charterers in consequence thereof, or the surety for either or both of them, in consequence of their undertaking, shall become liable to pay and shall pay by way of damages to any other persons or person any sum or sums in respect of such collision, we, the underwriters, will pay the assured or charterers such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the vessel hereby insured, provided always that our liability in respect of any one such collision shall not exceed our

proportionate part of the value of the vessel hereby insured."

(Then follows the agreement that if liability is contested with the consent of the underwriters, they will pay a like proportion of the costs.)

"But when both vessels are to blame, * * * claims under the collision clause shall be settled on the principle of cross liabilities * * *."

Sister-ship Collision: "* * * The principles involved in this clause (full collision) shall apply to the case where both vessels are the property, in part or in whole, of the same owners or charterers, all questions of responsibility and amount of liability as between the two vessels being left to the decision of a single arbitrator."

The policy contains a typewritten endorsement restricting the use of the barge to inland waters of Texas and Louisiana; granting privilege to carry oil in bulk except gasoline; providing a $100.00 deductible; stipulating that "no right or subrogation shall exist against any vessel owned in whole or in part or chartered by the assured on the bare boat basis"; and permitting the charter of the "vessel insured".

This policy is primarily insurance on the hull of the barge *Texas No. 2* and indemnifies her owner against loss of or damage to the barge caused by the perils insured against. Incidental to the hull coverage the policy contains certain features indemnifying the owner against liabilities growing out of the operation of that hull—for example, the full collision clause.

The Sole Issue.

The pertinent part of the collision clause in this barge policy provides:

"* * * If the vessel hereby insured shall come into collision with any other ship or vessel and the

assured * * * in consequneec thereof * * * shall become liable to pay and shall pay by way of damages to any other person * * * any sum or sums in respect of such collision, we, the underwriters, will pay the assured, etc."

The issue is whether under this collision clause in the barge policy, her underwriter has to pay for collision liabilities incurred by the common owner of the tug and barge arising solely out of the negligent navigation of the uninsured and towing tug. In short, whether a policy insuring only a dumb and innocent barge and her owner covers the collision liability of the controlling and negligent tug and her owner, solely because the vessels are commonly owned.

This is the only point involved in this petition.

B.

The Circuit Court of Appeals has decided an important question of General Marine Insurance Law in a way that is untenable and erroneous, and by its decision has overturned a longstanding and universally accepted interpretation in marine insurance circles of the standard full collision clause forming part of the standard hull policy.

The reasons relied upon for the granting of a writ are as follows:

1. The decision of the Circuit Court of Appeals is untenable and erroneous.

2. It overturns the interpretation of the standard full collision clause of the standard hull policy, which has been universally accepted in marine insurance circles for over 100 years, both by underwriters and by the assured. The interpretation imposes on these underwriters a liability

which they never intended to assume, which they never took into consideration in fixing their insurance premiums, which they have never heretofore recognized, and which has never been imposed upon them down to this time. The policy is in general use not only in the Fifth Circuit but throughout the United States. The form of collision clause involved is found in many other marine policies. Rights, vested and contingent, have arisen under these policies which the decision seriously affects. The decision so disturbed marine underwriters of the United States that thirty-five of them, as *amici curiae*, filed in the United States Circuit Court of Appeals a brief in support of this petitioner's application for a rehearing.

3. The question involved therefore is one of general marine insurance law and of nation-wide importance. It has never been decided by this Court.

4. The decision is in conflict with the only case directly in point, *Kelly Island Lime and Transport Company* v. *Commercial Assurance Company*, decided by the Ohio Court of Appeals on July 23, 1923, and reported in 1923 American Maritime cases, page 959.

WHEREFORE your petitioner prays that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings numbered and entitled on its docket No. 9280, E. Eggers, Individually and as Claimant of the *Tug Fanny D., etc., appellant*, v. *Southern Steamship Company and National Union Fire Insurance Company, Appellees;* and that the judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Hon-

orable Court; and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem proper and just.

Respectfully,

NATIONAL UNION FIRE INSURANCE COMPANY,
By GEO. H. TERRIBERRY,
JOS. M. RAULT,
WALTER CARROLL,
Proctors for Petitioner.

New Orleans, Louisiana, August 15, 1940.